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No. 49

# In the Supreme Court of the United States

OCTOBER TERM, 1954

WILLIAM J. OPPER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is reported at 211 F. 2d 719.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 765). The petition for a writ of certiorari was filed on April 24, 1954, and granted on June 7, 1954 (R. 775). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F. R. Crim. P.

## STATUTES INVOLVED

18 U.S.C. 281:

> Whoever, being * * * [an] officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensaiton for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such con-

spiracy shall not exceed the maximum punishment provided for such misdemeanor.

## QUESTIONS PRESENTED

1. Whether petitioner's statement, denying guilt but embodying some evidence tending to prove a part of the offense, voluntarily made to investigating officers after the offense, must be excluded unless corroborated.

2. Whether, assuming that corroboration was necessary, petitioner's statements were sufficiently corroborated by other evidence.

3. Whether the jury in convicting petitioner, and the court below in sustaining his conviction, relied upon statements of his codefendant which, as a matter of law, were not competent evidence against him.[1]

## STATEMENT

In the first count of a five-count indictment returned in the United States District Court for the Southern District of Ohio, Robert George

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[1] The Court, in granting certiorari (347 U.S. 1010), referred to the questions to be argued, in the language of the petition, i.e.:

> "Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.
>
> "Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.
>
> "Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him."

Hollifield, Sr., a federal employee, was charged, as principal, with agreeing, on or about October 1, 1950, to receive compensation of $1,750 from petitioner, William J. Opper, charged as aider and abettor, for services to be rendered by Hollifield in relation to certain purchase requests and contracts pending before the Department of the Air Force of the United States, the services to consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles (R. 1-2).

In counts two, three, and four, Hollifield, as principal, and petitioner, as aider and abettor, were charged with payments by petitioner to Hollifield in amounts of $50 and $250 on or about March 1, 1951, and $200 on or about August 5, 1951, for the above services (R. 2-6).

Count five charged a conspiracy between Hollifield and petitioner, from about October 1, 1950 to September 26, 1951, to cause Hollifield to receive compensation from petitioner for the services described in the first four counts, and to defraud the United States of and concerning its right to Hollifield's lawful functioning as an employee (R. 6-7, specifying 13 overt acts at R. 7-9).

At the trial, evidence was adduced by direct testimony of witnesses and introduction of documents and letters, and the government also presented evidence of full oral and written confessions

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[2] These counts specified three purchase requests and two contracts in addition to those specified in count one.

by Hollifield, and oral and written statements of petitioner that he had handed Hollifield sums in the aggregate amount of $1,200 as loans. Hollifield and petitioner did not take the stand.

The evidence covering the main features of the events during the period of the conspiracy, independent of the statements of Hollifield and petitioner, may be summarized as follows:

During the period covered by the indictment, Hollifield was Chief of the Land Survival Unit at the Aero Medical Laboratory, Wright Air Development Center (Wright Field), Dayton, Ohio. As designer supervisor of land survival equipment, he prepared specifications for survival kits, with opportunity for wide use of independent judgment in planning and supervising the accomplishment of land survival equipment (R. 88-89, RE 49-51).[3]

Petitioner was engaged in the toy, novelty, and war surplus business in Chicago, Illinois, and possessed equipment for manufacture of compasses (R. 161-162, 601).

Late in September, 1950, Chester Buchsbaum, of Chicago, Illinois, desiring to bid on a government purchase of the E-1 type of sustenance kit, interviewed Hollifield at Wright Field and, upon inquiring where some of the components of the kit could be bought, was referred by Hollifield to petitioner

[3] The designation "RE" refers to volume III of the record which contains the exhibits. The pagination of this volume does not follow consecutively that of volumes I and II.

for the compass item. Buchsbaum asked for petitioner's address and Hollifield replied, "I don't know anything about it except his name is Opper and he is in Chicago" (R. 129-130, 154-155).

In the early part of October, 1950, Holton, an employee at Wright Field, saw petitioner present in the quarters of the Land Survival Unit at Wright Field, and talked with him. In cross-examination, Holton testified that he was "fairly certain" that this occurred "within the first week or ten days of October" (R. 354, 364).[4] Holton saw petitioner three or four times subsequently (R. 354).

Adam D. Cappel, of Dayton, Ohio, also preparing to bid on the E-1 kit for Cappel-MacDonald Company, was given the name of petitioner by Hollifield, as a source for the compass component, Hollifield stating that he had only heard of petitioner and did not know his address in Chicago. Cappel, testifying for the defense, estimated the date of the conversation as "possibly the 10th or 9th of October", and stated that his associate Wayman

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[4] Further cross-examination on the point was as follows (R. 364-365):

> Q. If it were to be suggested to you that Mr. Opper was never at that Field until after the E-1 contract bids had been filed on the 13th of October, would it still be your testimony that you had met him about the 10th, or at a later time?
>
> A. I couldn't be certain.
>
> Q. In other words, you are not certain as to those dates, when you saw him. It could have been after the 13th of October. Correct?
>
> A. Possibly.

then located petitioner in Chicago by phone and arranged for bids (R. 605-606).

Prior to the submission of bids on the E-1 kits, both Buchsbaum and Cappel-MacDonald were informed by petitioner of his ability to supply goggles for the kits (R. 130-131, 606).[5] Cappel sent one Kline with samples of various components, including the goggles, to Hollifield on October 12. Cappel testified that Kline telephoned him the goggles were rejected for lack of a spare set of lenses (R. 607-608), and Norman K. Hanselman, of Hollifield's unit, likewise testified that the goggles were rejected for lack of the spare lenses (R. 577).

On October 13, 1950, the date for filing bids on the E-1 kits, Buchsbaum went to Hollifield's office with his bid and asked prior examination of a sample war surplus goggle he had been furnished by petitioner, pointing out that he was having difficulty obtaining new goggles of this type (R. 149-150). With Hollifield at the time were others of the Wright Field organization, i.e., Hanselman, Murray, and Barker. Buchsbaum gave the following description of what ensued (R. 150-152):

> Mr. Bob Hollifield picked up the goggles and said: "I have seen these goggles before. They are no good." He said: "I rejected them yesterday * * *. They have a component part missing, that is, the extra lenses. The goggles

[5] Ski-goggles, required for the E-1 kits, are not to be confused with sun-goggles, required for the D-1 kits discussed *infra*.

require a pair of extra lenses, according to the specification." And Mr. Hanselman, who was right there, with me, knew as well as I know that the extra lenses were there.

Q. Where were these extra lenses? Describe these goggles to the Court and jury. Were they in a case or not?

A. The goggles were in a case; they are folded in two and they are compactly put into a sort of semi-circular case with a snap fastening a little flap that goes over the case.

* * * * *

Mr. Hollifield said he didn't know they were there. "This makes it different," he says, "Just a minute." And with that, to my recollection, he and Mr. Hanselman and Barker, I am not sure about Murray, they went in the next room across the hall, while I waited and they were comparing them with a similar pair of glasses that they had across the hall, which was a component part. Then about, I would say, ten minutes later they came back and Mr. Hollifield said: "I will approve these glasses, but * * * I will have to call [Cappel-MacDonald] and tell them that I am approving these. It is unfair if I don't."

Hanselman denied that he knew of the spare lenses until Buchsbaum showed where they were in the case (R. 578-579). Hollifield, according to Buchsbaum, put a call through to Cappel-MacDon-

ald, but Buchsbaum did not hear the conversation (R. 152). Buchsbaum thereupon affixed a rider to his bid providing for purchase of 14,200 of the goggles at $1.40 apiece (R. 130, 132, 152-153, RE 117).

Cappel-MacDonald's bid, filed on October 13, 1950, disclosed a striking out of the name of a Massachusetts concern as supplier of the goggles at $5 per item, and insertion of petitioner's name, at $1.40 per item (RE 89-90). Cappel testified that this was done just before filing, pursuant to phone approval by Hollifield (R. 608-609).

The contract was awarded to Cappel-MacDonald. The formal request for approval of use of the goggles, and the formal approvals themselves, followed at later times, Hollifield preparing the recommendation for approval dated November 22, 1950. Petitioner duly received payment of $19,880 for the goggles (R. 646, RE 29-36, 39-48, 81-92, 94, 107, 118-119).

Petitioner compensated Buchsbaum for obtaining approval of the goggles, by $4,000 in discounts on other purchases of the Buchsbaum company (R. 166).

Cappel testified that he met petitioner in Cappel's office in Dayton within "a matter of days" after October 13, 1950 (R. 612), and his employee, Marijane Morrissey, testified that she likewise met petitioner in Dayton shortly after October 13 (R. 190). However, Buchsbaum testified that in a conversation after October 19, 1950, petitioner inquired as to how one would go about going to Wright Field,

whom one should see as to what might be needed in other war surplus, and—when Buchsbaum suggested Hollifield—how one would get in touch with him. Buchsbaum replied, "The easiest way to do, when you get there, ask Mr. Hollifield how to get there. You have to get a bus. Ask him where to get the bus. I don't remember the building number" (R. 161-162, 167).[6]

Later, Buchsbaum made bids with respect to the D-1 kits which included sun goggles rather than ski goggles of the E-1 kits, and on January 8, 1951, he submitted samples of petitioner's war surplus goggles in this connection, since these had been made under specifications other than those designated in the contracts (R. 138-140, 163, RE 73-75). After testing the goggles, the Aero Medical Laboratory, on January 23, 1951, recommended rejection of the goggles because of "marked deviations" from specifications (R. 374-377, RE 80). Thereupon, on or before January 25, 1951, Hollifield phoned Moss, the project engineer who had prepared the rejection sheet, and asked to talk about the matter and bring someone with him. The additional person was petitioner, and the resulting meeting included, *inter alia*, one Murray, who was the project engineer on the D-1 kit (Hollifield was project engineer on the E-1 kit, and was also Mur-

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[6] Buchsbaum stated the time to be after his delivery of bids on both E-1 and D-1 kits (R. 160), the bid on the latter having been delivered to the Air Force on October 19, 1950 (R. 134). At another point in the testimony, the date was narrowed to "approximately October 20" (R. 167).

ray's unit chief) (R. 377-378, 387-388). In the hour-long discussion, Hollifield "practically exclusively" urged the acceptance of the goggles, Murray taking little part (R. 399). It was concluded that Hollifield should prepare a written memorandum of his reasoning (R. 378). The memorandum which followed, dated January 25, 1951, bore the typed initials of Hollifield as the person preparing the memo, but did not bear his signature at the point where one preparing a memo would usually sign, the only signature at that point being that of his subordinate, Murray (RE 81).[7] The reasons adduced in the memo were those employed by Hollifield at the conference (R. 379, RE 81). On the basis of this memo, petitioner's goggles were approved, under date of February 3, 1951 (R. 380-382), and authorized for use in contracts under which Buchsbaum was to supply some $56,700 worth of goggles (RE 76).[8]

The records of the telephone company disclosed a long distance call on April 13, 1951 from Hollifield's residence in Dayton, Ohio, to petitioner in Chicago (R. 415-416, RE 109, 111). A Chicago bank teller identified a $1,000 check of petitioner, dated the same day, and made out to "Cash" (R.

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[7] Further disclosure that Hollifield was the person who actually prepared the memo was adduced in that the language at one point slipped into an erroneous reference to the E-1 kit, which was Hollifield's own project, rather than the D-1 kit (RE 81).

[8] Purchase orders for 8,500 and 5,000 kits respectively (R. 96-98), with 3 pairs of goggles per kit (RE 61, 63), at $1.40 per pair (RE 117).

426, RE 103). Airline records disclosed tickets in Hollifield's name, that were used for flights from Dayton to Chicago on the morning of April 14, 1951, and return to Dayton that evening (R. 421-422, RE 112-113). The bank teller further testified that, on April 16, 1951, petitioner cashed the April 13 check (R. 425-428).

Petitioner was first questioned by the F.B.I. at the office of the F.B.I. on October 10, 1951 (R. 318). He was cautioned that he was not compelled to speak but that anything he might say might be used against him (R. 319, 349). In this and further interviews on October 12th, 16th, and 29th, he stated that approximately two years before (1949) he had left his name at Wright Field as a source of compasses, that he had received inquiries from Buchsbaum and Cappel-MacDonald which led to the dealings in goggles, that these firms handled "the question of the specifications," that eventually he received orders for the goggles, that he met Hollifield for the first time at the Cappel-MacDonald office in October 1950, and had met him on approximately fifteen occasions thereafter at Wright Field and in Chicago; that his first contact in Chicago with Hollifield had been at Buchsbaum's where he was trying to expedite some purchases; and that on that evening he (petitioner) and Hollifield and their wives went out socially (R. 320-323, 339-341, 346-347).

When petitioner was asked, in the first interview, about any money transactions with Hollifield, he stated that he wished to consult an attor-

ney before any further discussion (R. 321, 347). In the second interview, two days later, and in the third interview, petitioner stated the following to the F.B.I.:

After the social evening, he next met Hollifield on a Saturday, April 14, 1951, when Hollifield came to his office, pursuant to an earlier phone call, and pleaded financial distress because of the mortgage on his home, and asked help to the extent of $1,200. Petitioner obtained $1,000 in currency at his home and gave it to Hollifield in the washroom of a restaurant (petitioner's wife and Hollifield's daughter being at the restaurant), and he later replenished the currency at home with the proceeds of the April 13 check cashed on Monday, the 16th. (R. 323, 332-333).[9] Petitioner stated that the transaction was a loan, but he had no personal knowledge whether Hollifield had a home, and he had no security for the loan, nor any receipt or record of it. There was no agreement as to interest and Hollifield was to have "up to about two years" to make repayment. No repayments were ever made. Petitioner stated that he once asked for a payment but received none (R. 323-324). Two weeks after the loan, petitioner handed Hollifield an additional $200 in a car en route Wright Field from Dayton (R. 324).

In the interview of October 16, petitioner

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[9] Petitioner's bank statement, in the printed record, for the period February 28 to June 28, 1951, discloses numerous checks of $1,000 or more but does not show these, like the instant check, to have been for cash (RE 104-106).

brought to the F.B.I. office a prepared written statement of his recollection of the transactions, substantially repeating most of the oral account and adducing charity as the motive rather than compensation for service (R. 325).[10] Petitioner

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[10] The written statement is as follows (RE 101-102):

"I have been asked to submit a statement relating to my so-called dealings with Robert Holafield [sic].

"In the winter of 1950, as best I can recall, I was at Dayton, Ohio then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime-contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

"I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

"Sometime in the early part of 1951 Mr. Holafield had

also brought to the F.B.I. certain bank statements and a check. The F.B.I. agent requested more detail and petitioner stated that he felt that the letter was sufficient and that "he did not want to put any further information in writing" (R. 331-332, 336, 344-345). In the interview of October 29, petitioner furnished invoices of his sales transactions, but when the discussion again reached a request for a detailed written statement concerning the delivery of the $1,200, petitioner stated that he desired first to consult his attorney; on November 1st he phoned, refusing the statement upon advice of his attorney (R. 349-350).

The trial court also admitted evidence of statements by Hollifield to F.B.I. investigators, testimony of Hollifield before the Grand Jury, and sworn written statements by him. The trial judge and counsel devoted repeated and extensive attention to the matter of keeping the jury alert to the necessity of considering the admissions of each

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been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan."

defendant only against the particular defendant who made the admissions (R. 260-261, 268-269, 290, 319-320, 331, 444, 503-504, 667-668).[11]

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[11] See the judge's language at the outset of the testimony concerning Hollifield's admissions (R. 260-261):

"Stop right there. Now, Members of the Jury, I want to instruct you at this time, I can't make my instructions too forceful. It is very important that you keep in mind what I am about to tell you. Perhaps it is rather difficult to be able to do so, but it is one of the duties that you will have to perform to the very best of your ability. In any statement that Mr. Hollifield, the defendant Hollifield may have made to this witness or any other witness, if we reach that stage wherein he mentions Mr. Opper, defendant Opper, you must not, in the absence of Mr. Opper, that is, this office where Mr. Opper was not present,—And he wasn't present, was he?

"The Witness: No, sir.

"The Court: When Mr. Hollifield, defendant Hollifield makes any statement by way of admission or confession, or whatever you please to call it, as to himself Hollifield, you may consider all of that testimony along with all the other testimony in the case in arriving at your ultimate conclusion and verdict, but you must not consider as evidence in this case as against the defendant Opper anything that may have been said by the defendant Hollifield in Mr. Opper's absence. This testimony is the statement by way of admission or confession, whatever you please to call it of Mr. Hollifield and it applies to Mr. Hollifield alone and exclusively, to nobody else.

"So, if in the course of this testimony, the name of Mr. Opper, defendant Opper is mentioned, you may not consider that and must not consider that as any testimony whatsoever as against the defendant Opper. You may consider it for whatever you think it may be worth as to its weight and so forth as against the defendant Hollifield.

"Nobody has the right to confess, if you call it a confession, for somebody else. It is all right to talk about themselves, but they cannot make some admission about somebody else who isn't present, at any event, and Mr. Opper was not present on this occasion.

"Now, please remember that. It is very important in this case. That principle must not be lost sight of and I instruct

In addition to these admonitions, the court in its final instructions charged the jury (R. 721-722):

> In this connection, however, I desire to call your attention to the following: There has been introduced in evidence through various witnesses, statements that were made on various occasions; some by the defendant Hollifield and some by the defendant Opper. There is in evidence the oral testimony of certain witnesses as to what these statements were. In addition to this oral testimony there are now in evidence three documents marked Government's Exhibits 37, 38 and 41.
>
> Exhibits 37 and 38 are written statements, signed by the defendant Hollifield. Exhibit 41 is a written statement signed by the defendant Opper.
>
> I have heretofore instructed you during the progress of the trial, as forcibly as I know how, but I repeat here that anything that defendant Hollifield may have said or written about himself in connection with the transactions here under consideration in the va-

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you now and I will instruct you later on, if we reach that stage in the trial, but right now I tell you in advance so there cannot be any question, what the Court is trying to impress upon you as forcibly as I can, because that is the law, and the defendant Opper is entitled to the benefit of that law, it is a shield thrown around him in this case, that he is entitled to and it must not be taken away from him. Anything that the witness testifies to that Mr. Hollifield said about himself you can consider along with the other testimony in the case and give it such weight as you deem it properly deserves.

"Now, with that understanding, you may proceed."

> rious counts of the indictment, you may consider as evidence against the defendant Hollifield, but you must not consider such statements as evidence against the defendant Opper.

Petitioner and Hollifield were found guilty on all counts (Pet. 8). Petitioner was sentenced to consecutive terms of imprisonment of two years on count 1 and one year on count 4; to fines of $500 each on counts 2 and 3; and to a term of imprisonment of one year and one day on count five, this sentence to run concurrently with the sentences imposed on counts 1 and 4. (R. 20, 29.)

On appeal, the Court of Appeals affirmed the judgment of conviction on counts 1, 4 and 5 and reversed on counts 2 and 3 on the ground that there was no competent evidence against petitioner to establish the specific payments charged in the reversed counts (R. 765, 772).

## SUMMARY OF ARGUMENT

### I

It is the petitioner's position that admissions by a defendant after the commission of an offense are to be subjected to corroboration in the same manner as confessions. It is the government's position that only when a statement consists of a conscious admission of guilt does it contain the infirmities of a confession which have led to the imposition of the requirement of corroboration. In the case of a denial of guilt, such as is here

involved, the basis for requiring corroboration of confessions is entirely absent.

This Court has stated in *Warszower* v. *United States*, 312 U. S. 342, that the purpose of requiring corroboration of confessions is simply to guard against convictions based on untrue confessions. The same need exists whether the confession is untrue because it has been extorted by improper pressures or because it is derived from a psychopathic aberration. While many confessions are, of course, completely voluntary and sane, the very circumstance of an individual's inviting punishment by accusing himself is a sufficient departure from normal conduct to give rise to doubts, which most courts require to be settled by corroboration of the confession. But an outright denial of guilt, with an exposition of the story which the accused would like to have believed, is a perfectly normal human reaction. There is not present in the statement the inherent contradiction which requires it to be tested more thoroughly than any other statement. The truth of the facts admitted should be for the jury.

In accordance with this analysis, the courts have generally drawn a sharp distinction between denials of guilt and confessions or admissions of guilt. This Court has itself recognized the distinction long ago in *Wilson* v. *United States*, 162 U. S. 613, and as recently as last term in *Stein* v. *New York*, 346 U. S. 156. And, by and large, the other federal courts and the state courts have also drawn the same line.

Petitioner's argument is largely based upon a dictum in *Warszower* v. *United States*, 312 U. S. 342, at 347, which when read by itself could be taken as indicating that this Court was equating all admissions after the crime to confessions. However, the particular form of that dictum was obviously derived from the facts in the particular case, where the statements in question actually preceded the commission of the offense and therefore could not constitute an admission of guilt. The meaning which petitioner would attach to the statement does not take into account the later expression of the Court in *Stein* v. *New York*, 346 U.S 156, and should not be adopted here. Petitioner also seeks for comfort in certain cases where there was indication that the statements had been extorted from a prisoner, in which case the test of admissibility was similar to that for extorted confessions. We would not argue that any involuntary statement drawn from an accused by illegal police methods should form the basis for his conviction. But the fact that where there is a basis to suspect compulsion the circumstances should be explored, does not mean that where there is every indication that a statement was carefully and voluntarily made it should be subjected to an artificial rule for admissibility.

## II

Assuming, for the sake of the argument, the requirement of corroboration of the exculpatory statements of the petitioner, the next question is

whether his admissions were sufficiently corroborated to justify letting the case go to the jury.

It is well established that the corroboratory evidence need not be of such degree as by itself to establish the guilt of the accused. This is clearly stated in both *Daeche* v. *United States*, 250 Fed. 566 (C. A. 2) and *Forte* v. *United States*, 94 F. 2d 236 (C. A. D. C.), which are said to exemplify the two most commonly accepted applications of the corroboration rule. There is general accord on this aspect of the rule.

Petitioner's brief analyzes the issue between *Daeche* and *Forte*, as the extent to which the various elements of the *corpus delicti* must be touched upon by the corroboratory evidence. *Daeche* holds that, if the evidence supports the confession with respect to any of the elements of the *corpus delicti*, that is sufficient; *Forte* requires that the corroboration must extend to every element of the crime alleged. Where a complete confession is involved, this makes a very substantial difference in the quantity of outside evidence that must be introduced since under the *Daeche* rule the confession may be relied upon for proof of all the elements of the crime provided it is corroborated with respect to any element essential to prove the crime. Under the *Forte* rule, all elements of the offense must be corroborated so that the confession may not be relied upon alone to prove any of them.

Application of these requirements to the admission of a single damaging fact, as distinguished

from a complete confession, is technically difficult. However, *Daeche* stands for the proposition that the corroboration need not deal directly with the fact admitted, but need only support the charge that a crime has been committed by supporting the proof of an essential element of the crime. As applied to this case, where the two elements of the substantive offense are the payment of the money and the performance of the services, the admission of course deals with the payment, while the corroboration would be sufficient if it supports the accusation that the services were rendered. This interpretation of the rule appears to meet the underlying reason for requiring corroboration which, as expressed in *Warszower*, is to protect the "administration of the criminal law against errors in convictions based upon untrue confessions alone", without imposing more stringent restrictions on the admission of evidence or the functions of the jury than are necessary. Under this interpretation of the rule, there was ample corroboration in this case. Actually, nearly the entire record, outside of the admissions, supports the assertions of the indictment that the services were rendered. Certainly, petitioner does not object that there was insufficient evidence on this issue to go to the jury.

On the basis of the *Forte* interpretation, not only would the corroboration have to support the performance of (or the agreement to perform) services, but it would also have to touch upon the payment of (or agreement to pay) the money.

While it would seem to go far beyond the necessities of the rule to require corroboration of this element also, in the instant case there was ample evidence, in addition to the admission, of the payment as well as the services. The most direct corroboration consisted of evidence of: (a) the opportunity—Hollifield made a long distance call from his home to petitioner on April 13 and made a one-day round trip to Chicago on April 14 (the place and date of the admitted payment); (b) The means—petitioner drew a check for $1,000 payable to cash on April 13 (the day of the telephone call) which he cashed on April 16 (to replenish money he had taken from his house); (c) The motive—there was ample evidence of the relationship between the parties and of Hollifield's successful efforts to get petitioner's product accepted. More indirectly corroborative is the entire body of evidence showing another payment by petitioner to another businessman to get his products accepted, and the apparent attempt of both parties to conceal their activities. While the evidence was circumstantial, there can be no doubt that it was substantially corroborative.

## III

The whole impact of the third point of petitioner's brief is an attack upon the use of the conspiracy count in criminal indictments and the desirability of adopting a stringent rule for the corroboration of admissions as a means of combating the evil. But the conspiracy argument has

nothing to do with this case. None of the statements of Hollifield or of the petitioner was offered or admitted against the other, so that there was no use of the conspiracy count to introduce evidence against a co-conspirator. If petitioner had a complaint about confusion in the minds of the jury, it must arise from the fact the defendants were jointly tried for their joint offense, the substantive counts as well as that for conspiracy. This is customary in this type of case. See e.g., *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C. A. 2), certiorari denied, 309 U. S. 664.

While there is inherently the danger of confusion in any joint trial, it is best met by careful instructions. Here, there were the most meticulous directions to the jury, both during the trial and at its conclusion. The court below corrected what it considered an error by the jury in convicting on two counts without sufficient evidence. Since there was ample evidence to support the conviction on the remaining counts without reliance on the confessions of the petitioner's co-defendant, it is pure speculation to assert that the jury acted improperly. Nor is there reason to believe from its opinion that the court below placed any reliance on Hollifield's confessions in affirming the conviction of the petitioner.

ARGUMENT

## I

**Petitioner's Admissions Did Not Require Corroboration Since They Were Part of a Denial of Guilt Rather Than a Confession of Guilt**

The principal statement by the petitioner which is here in question constituted in its entirety a carefully considered, written, detailed, and specific denial of guilt. In part, petitioner stated (RE 102):

> I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.
>
> Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00

> which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan.[12]

This statement is obviously at the opposite pole from a confession or admission of guilt.

The direct holding of this Court in *Warszower* v. *United States*, 312 U.S. 342, makes it perfectly clear that the requirement for the corroboration of confessions does not apply to admissions made prior to the commission of a crime. Petitioner distinguishes, again on the basis of *Warszower*, between admissions before and after the fact and claims that as to the latter the corroboration rule applies (Pet. Br. 11-13). The language of the *Warszower* opinion (*infra*, p. 32) lends some apparent support to this position, but it is our purpose to demonstrate that it was not intended to apply to an admission such as is here involved, but only to a conscious admission of guilt. The fact that an admission precedes the crime is important because it makes it impossible that it could include an admission of guilt, but the fact that an admission follows a crime by no means demonstrates that it is consciously inculpatory.

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[12] In oral statements, the petitioner is stated to have fixed the time as April 14, 1951, the place as the washroom of a restaurant in Chicago, and the means as $1,000 in currency taken from funds at his home which he later replenished with a check drawn to cash on April 13 and cashed on April 16.

To avoid confusion, it may be well at the very beginning to distinguish the case before the Court from the situation where an admission is made by an accused person under circumstances giving rise to the suspicion that illegal pressures have been applied. Petitioner cites certain cases (*Wilson* v. *United States*, 162 U.S. 613; *Bram* v. *United States*, 168 U.S. 532) which indicate that admissions made under such circumstances are subject to the closest scrutiny before they may be admitted in evidence (Pet. Br. 14). Generally, the same precautions are adopted as are followed for confessions given in like circumstances.[13] But it proves too much to assume from this that in other respects and under other circumstances admissions and confessions should be treated the same. Any statement drawn from a speaker by force, whether it be confession, admission, or other testimony, is more apt to reflect the views of the torturer than the tortured. In the present case, the circumstances under which the statements were made give no indication whatever of compulsion. On the contrary, here is the case of a fully responsible business man, specifically guided by counsel, giving a careful exonerative statement to investigators in advance of any charges being made against him, much less any imprisonment, and then reducing such of those

[13] See, e.g., *Ziang Sung Wan* v. *United States*, 266 U. S. 1, 15, where four admissions and a confession given after seven days of interrogation were all treated as involuntary and found improperly admitted in evidence.

statements to writing as he and his counsel felt were to his advantage while refusing to confirm in writing certain other of his oral statements. Any analogy between the present case and the admissibility of admissions given in circumstances suggesting the possibility of improper inducement is inapposite.

Thus narrowed, the question before this Court is whether admissions included in unequivocal denials of guilt, made under circumstances completely devoid of indication or implication of coercion or improper inducement, carry in themselves the germ of untrustworthiness found in confessions, so that the same rule of corroboration must be applied to them before they may be submitted to the jury for its appraisal.

### A. *The Basis for Requiring Corroboration of Confessions is Inapplicable to Denials of Guilt*

In its order allowing certiorari in this case (R. 775, 347 U.S. 1010), as in its opinion in *Warszower* v. *United States*, 312 U.S. 342,[14] this Court has recognized the existence of the rule followed in

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[14] A second statement in *Warszower* seems to limit the requirement of corroboration to such exceptional cases as perjury. The Court's language (312 U.S. at 347-348) is: "An uncorroborated confession or evidence of perjury, given by one witness only [citing *Phair* v. *United States*, 60 F. 2d 953 (C.A. 3); cf. *United States* v. *Harris*, 311 U.S. 292; both perjury cases], does not as a matter of law establish beyond a reasonable doubt the commission of a crime, but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions."

many jurisdictions that a defendant may not be convicted upon the basis of his confessions alone and that corroboration of the confession must relate to the *corpus delicti* of the offense. It should be noted, however, that there is no direct holding of this Court that either confessions or admissions require corroboration. In fact, in several early cases dealing rather exhaustively with the subject of confessions the requirement of corroboration is entirely neglected. *Miles* v. *United States*, 103 U.S. 304; *Hopt* v. *Utah*, 110 U.S. 574; *Sparf and Hansen* v. *United States*, 156 U.S. 51.[15] This suggests that the rule is not one of such obvious soundness as to achieve such immediate and universal acceptance as to lend weight to its extension to related fields.

It is suggested, 7 Wigmore, *Evidence* (3d ed.) § 2071, that the wide acceptance of the rule in the United States is attributable to the suggested bases of the rule found in 1 Greenleaf, *Evidence* (15th ed.) § 217, as follows:

> In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords

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[15] The rule has been explicitly rejected in Massachusetts (*Commonwealth* v. *Sanborn*, 116 Mass. 61; *Commonwealth* v. *Killion*, 194 Mass. 153) and Wisconsin (*Potman* v. *State*, 259 Wis. 234). In England, it appears to apply only to a few crimes. See 3 Russell, *Law of Crimes* (7th Eng., 1st Can. ed.) 2156; 9 Halsbury, *Laws of England* (2d ed.) 207,183. The American Law Institute's *Model Code of Evidence* contains no requirement that confessions be corroborated.

> with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law.

Greenleaf does not define "confession" in connection with his discussion.[16] However, since the various statements of the rule almost invariably use the word confession in explaining the circumstances in which it is applicable, the meaning intended in the use of the term is obviously important. In fact, it is stated in 7 Wigmore, *Evidence* (3d ed.) §2074(a): "Whether the accused's statement amounts to a confession, so as to require corroboration under the present rule, depends on the definition of a confession (*ante* §821)."

The general lay concept of a confession is, of course, totally remote from what is here involved. Petitioner did not "confess" but, instead, argued his innocence. More precise definitions restate the same conclusion. Thus, Wigmore defines a confession (3 *Op. Cit.* §821):

> A confession is *an acknowledgement in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it.* * * *
>
> * * * * * *

[16] In an earlier section it is defined as "acknowledgments of guilt." 1 Greenleaf, *Op. Cit.* § 170.

(2) *Exculpatory statements,* denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed: [citing numerous authorities] * * *.

(3) An acknowledgement of a *subordinate fact, not directly involving guilt,* or, in other words, not essential to the crime charged, is not a confession * * *. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions [citing numerous decisions.][17] [Italics those of the author].

More basic, however, than a mere matter of definition is the consideration of whether the fundamental reasons underlying the adoption of the rule of corroboration for confessions are applicable to admissions contained in denials of guilt.

Since there is no decision of this Court directly upholding the rule, it is not strange that no complete exposition of its basis can be found here.

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[17] See also Underhill, *Criminal Evidence* (4th ed., 1935) 507-511; 2 Wharton, *Criminal Evidence* (11th ed. 1935) 953-954, 959-960; 2 Chamberlayne, *Evidence* (1911), 1863.

Petitioner's citation of Wigmore as supporting his view that admissions are to be treated in the same way as confessions (Pet. Br. 15) indicates a disregard of all of Wigmore's definition but the first paragraph. The second paragraph particularly recognizes the type of statement involved in this particular case and excludes it, in Wigmore's analysis, from the necessity of corroboration.

However, some indication of this Court's understanding of the foundation of the rule may be found in its brief expression in *Warszower*, 312 U.S. 342, at 347:

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist.[18] Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

If this statement is to be taken literally, it automatically excludes the necessity of corroboration for partial confessions or admissions since other elements of the crime not admitted would have to be otherwise proved, so that it would be impossible to achieve convictions on the basis of the "confession alone."

Greenleaf's discussion (*supra*, pp. 29-30) and Wigmore's analysis indicate that they believe the basis of the rule is the initial distrust which courts have again and again expressed with respect to con-

[18] The Court here cites sections 2070-2071 of Wigmore, *Op. Cit.* These sections do not deal with the distinction between confessions and other statements, but the annotator in the 1953 supplement to the treatise suggests that the citation intended was § 821, p. 242, line 2, distinguishing exculpatory statements.

fessions. It is suggested that when tested for voluntariness and sanity they may become trustworthy evidence, but that they may not be accepted without some preliminary careful scrutiny. Several early decisions of this Court, dealing with confessions and admissions of guilt, express this conflicting attitude towards their acceptance as evidence. In *Hopt* v. *Utah*, 110 U. S. 574, the Court stated at 584:

> While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Regina* v. *Bald*, 2 Den. Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach, 263, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers."
>
> Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the

party making it that can be given of the facts stated in such confession. 1 Greenleaf Ev. § 215; 1 Archbold Cr. Pl. 125; 1 Phillips' Ev. 533-34; Starkie Ev. 73.

But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. * * *

See also *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55; *Wilson* v. *United States*, 162 U. S. 613, 621-623.

More explicitly, an outright confession, in which a person accuses himself and thereby lays himself open to punishment, results in the strange combination on a court's part of a preliminary conclusion of truth and an accompanying feeling that caution is required. The preliminary conclusion is that one would not indulge in a falsehood that can only lead to punishment. The caution is against the untested acceptance of a confession that can be so disastrous that from its very nature there arises

a possibility that compulsion, improper inducement, or mental abberation may have caused the strange act. The act of confessing thus intrinsically calls for an inquiry as to whether the actual facts and circumstances bear out the suspicion, or whether the confession is only the common instance of an accused person simply realizing that the jig is up and desiring to tell the truth and get the consequences over with.

A denial of guilt, on the other hand, has none of the contradictory elements which throw the shadow over the confession; it is the perfectly natural reaction both of the child caught near the cookie jar and the Sunday driver arrested for speeding. In the absence of self-accusation or of some other fact or circumstance disclosing or suggesting the presence of compulsion or improper inducement, there is no occasion for either a special test of the admissibility of an accused's statements or of corroboration once they are admitted. Obviously, the fact that a statement later turns out to be against the speaker's interest does not cast the same doubt upon it which would exist had he known of its adverse effect at the time he spoke. The test, therefore, should be whether the statement constituted a conscious admission of guilt.

### B. *The Cases Support a Different Treatment for Denials of Guilt than for Confessions*

Petitioner asserts that cases decided by this Court support the treatment of admissions after

the fact on the same footing as confessions (Pet. Br. 14). We believe that this is not so. The most recent expression on the subject is in *Stein* v. *New York*, 346 U. S. 156. There, in a prosecution for murder a witness was permitted to testify that, when he was brought into a room at the police barracks where the defendant was present, the defendant pointed him out as the driver of the truck in which the murdered man was riding.[18a] In footnote 5 on page 162, the Court dealt with the question of whether this was a confession, as follows:

> The defense says that this constitutes a coerced confession—Stein having made the statement in police custody. It was not a confession of guilt but an admission of a specific fact. Although New York may impose the same requirements for admissibility on an admission as it does on a confession, see *People* v. *Reilly*, 181 App. Div. 522, 528, 169 N. Y. S. 119, 123, aff'd, 224 N. Y. 90, 120 N. E. 113, such utterances are not usually subject to the same restrictions on admissibility as are confessions. See 3 Wigmore on Evidence (3d ed.) § 821 (3). In the face of the weight of authority to the contrary, it cannot be said that any such requirement is imposed by the Fourteenth Amendment. Even if this admission were subject to the same reliability tests as confessions, there is no evidence that Stein was under

[18a] This was not the confession the admissibility of which was the principal issue in the case.

any coercion thirty hours after his confession of June 7.

In *Ballew v. United States*, 160 U. S. 187, it was urged that the trial judge had improperly rejected evidence sought to be introduced on behalf of the defendant on the ground that, the witness having testified as to a confession, all of the attendant conversation should be admitted. In rejecting that argument, the Court clearly distinguished between confessions and admissions on the very basis we now urge. The Court said at page 193:

> The ground upon which counsel for plaintiff in error rests his claim of admissibility is that when a confession is put in evidence by the prosecution, it is the right of the accused to demand that all of the conversation in which the alleged confession was made should be received. We are unable to reach the conclusion that Ballew's mere statement to a witness, that the pensioner had given his son the check, was a confession, or in the nature of a confession. It had no tendency to establish his guilt or to operate to his prejudice, and confessions are only admitted as being statements against the interest of the party by whom they are claimed to have been made.

Even stronger support for our analysis is found in *Miles v. United States*, 103 U. S. 304, where the Court actually rejected the requirement that there be corroboration of the admissions there involved.

The case involved a prosecution of bigamy under the laws of the Territory of Utah. Part of the evidence on which the defendant was convicted consisted of statements, made by the accused to his friends after both marriages, that he had married the first of the women involved. The trial judge refused the defense request to give the following instruction (10 Office of Sup. Ct., Transcripts of Records [1880] pp. 8636-8637, R. 98-99):

> The first marriage and its legality must be affirmatively proved by evidence beyond the mere declarations, confessions, admissions, or reputations of the defendant; and if the jury believe from the evidence that there is no proof that def't and Emily Spencer were ever married beyond the mere admissions, confessions or declarations of the defendant, then they will find the defendant not guilty.

The trial judge charged the jury that it should determine the accused's guilt upon the basis of "all the facts and circumstances proven in this case, and from the admissions of the defendant, *or from either*" (103 U. S. at 308; italics supplied). This Court stated, on the general question of the validity of the admissions (103 U. S. at 312):

> The declarations of the [accused] touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that

> they had reference to a formal marriage contract between him and her.
>
> We are of opinion that the District Court committed no error in admitting such declarations, or in its charge to the jury concerning them.[19]

In asserting that this Court has erased the line between confessions and admissions, petitioner relies specifically on *Wilson* v. *United States*, 162 U. S. 613, and *Bram* v. *United States*, 168 U.S. 532. Neither of these cases supports the proposition for which it is cited. In *Wilson*, the Court in fact rested its opinion in part upon the distinction between confessions of guilt and denials, stating at 624:

> His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. * * * These were matters which went to the weight or credibility of what he said of an incriminating

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[19] That the issue now before this Court was specifically urged in the *Miles* case is made clear by an examination of the accused's brief (11 Office of Sup. Ct., File Copies of Briefs, 1880, No. 592, pp. 11, 13-14) where it is stated: "The *corpus delicti* can never be proven by mere admission. The law of bigamy should be no exception to the rule * * *." Moreover, in the opinion subject to review, the Supreme Court of Utah had itself stated in *United States* v. *Miles*, 2 Utah 19 at 25:

> It is, however, strenuously contended that the declarations, confessions or admissions of the prisoner are not alone sufficient proof of the first marriage. If the surroundings of such admissions show them to have been deliberate, they would be sufficient to support a verdict of guilty. * * *

> character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as a matter of law.

While in *Bram* the admission in question was considered by the Court to include a guilty admission, at page 562:

> The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean.

Moreover, both *Wilson* and *Bram* deal with situations where statements were made by accused persons in custody under circumstances indicating great doubt as to voluntariness. As stated above, no one can doubt that if any statement is made under coercion it should not be admitted, whether it be confession, admission, or other type of testimony.

The Court of Appeals for the District of Columbia, which is a court certainly not ill-disposed toward the corroboration rule, has itself pointed

out the distinction between confessions and denials of guilt in *Ercoli* v. *United States*, 131 F. 2d 354, at 356:

> Both appellant and the Government rely upon the case of Forte v. United States to establish their conflicting contentions concerning the disputed testimony. In the Forte case we stated the applicable rule governing the reception in evidence of extrajudicial *confessions*. In the present case appellant's statements to the officers were admissions made by appellant as exculpatory statements, rather than confessions. He did not in those conversations acknowledge guilt of crime, any more than he did in his testimony at the trial. The rules governing the reception in evidence of such admissions are much less onerous than those concerning confessions. But it is not necessary to draw the fine line of demarcation between the two, in order to decide this case, because, as we shall show, even under the requirements of the rule concerning confessions, appellant's statements were properly received in evidence.

See also *Morton* v. *United States*, 147 F. 2d 28, 31 (C.A. D.C.); *Dimmick* v. *United States*, 116 Fed. 825, 831 (C.A. 9).

Petitioner brushes aside the state cases relied on by the court below as not controlling and as not considering "the present question whether admissions in the nature of exculpatory statements

but still admitting some essential part of the offense charged require corroboration" (Pet. Br. 16). It must be admitted that the cases are not controlling, but they seem to us persuasive. All of these cases, *State* v. *Gilman*, 51 Me. 206, 225; *State* v. *Cadotte*, 17 Mont. 315; *State* v. *Novak*, 109 Ia. 717; *People* v. *Kristy*, 111 Cal. App. 2d 695; *Brauer* v. *People*, 113 Col. 194; *People* v. *Porter*, 269 Mich. 284, are specifically concerned with the legal distinction to be drawn between denials of guilt and confessions, the very distinction which the Government urges here. The fact that the issue is discussed in connection with initial admissibility rather than corroboration hardly reduces their persuasiveness.[20]

To a large degree, the petitioner's case is bottomed on the short statement by this Court in *Warszower* v. *United States*, 312 U.S. 342 at 347, "they [admissions made before the crime was committed] contain none of the inherent weaknesses of confessions or admissions after the fact." This language can be taken as linking all admissions after the fact with confessions in considering the necessity of corroboration. The

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[20] Of the three Court of Appeals cases cited by petitioner in support of his position, *Pines* v. *United States*, 123 F. 2d 825 (C.A. 8), appears to be a partial confession, rather than a denial, while *Gulotta* v. *United States*, 113 F. 2d 683 (C.A. 8) involves admissions made prior to the crime and therefore loses significance in light of this Court's holding in *Warszower*. Only *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), really supports petitioner and that is now pending before this Court on certiorari, No. 25, this Term.

language used was, of course, induced by the circumstance that the court was dealing with a statement made before the crime, which could not have been extorted by police officers trying to solve the crime nor based upon some unfounded guilt complex. It was therefore natural in that case to distinguish between statements before and statements after the crime. But that does not necessarily mean that the Court intended to decide that all after-the-crime statements have the same weakness as confessions. There was no occasion to consider outright denials of guilt as distinguished from admissions of guilt, for before the commission of the offense the statement could be neither consciously self-accusing or self-defending. Moreover, the language in *Warszower* should also be read in the light of the later decision of this Court in *Stein* v. *New York*, 346 U.S. 156 (*supra*, p. 36), where the distinction between confessions and admissions is clearly recognized.

Insofar as admissions by a defendant are to be distrusted, not because of some inherent incredibility or because of the suspicious circumstances under which they were made, but merely because they are the statements of an interested party and may spring from a concealed intent, the solution is not to expand the corroboration requirement, as heretofore applicable to confessions, to a new field. For even within its present boundaries, the rule, which is an unvarying exception "to the normal requirement that disputed questions of fact are to be submitted to the jury under appro-

priate instructions" (*Warszower* v. *United States*, *supra*, at 348), is debatable. As this Court said in *On Lee* v. *United States*, 343 U.S. 747 at 757:

> The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it. As this Court has pointed out: "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction." *Funk* v. *United States*, 290 U.S. 371, 376.

We are not here pressing for the abandonment of the artificial corroboration rule as it applies to confessions, merely for its containment within its present bounds. If a trial judge is convinced that an admission cannot serve to convince a jury beyond a reasonable doubt and that there is not sufficient evidence outside the admission, it is his clear

duty to keep the case from the jury. In the case of an admission, the corroboration rule is not necessary in the only circumstances in which it might otherwise be considered necessary to prevent unfounded convictions.

II

**If the Requirement of Corroboration Were Applicable to Petitioner's Statements, There Is Sufficient Corroborative Evidence Under Any of the Accepted Rules.**

Assuming, solely for the sake of the argument, that the requirement of corroboration is applicable to the exculpatory explanations of petitioner, the question is then reached whether his admissions were sufficiently corroborated to justify the court in letting the case go to the jury or the jury in bringing in a conviction. Since it decided the case on the ground that corroboration was unnecessary, the court below did not reach this issue directly, although it did speak of the "framework" in which, and the "background" against which, the statements were made, implying an awareness that the admissions were supported by the entire record (R. 771). However, it is our contention that the record contains sufficient corroborative evidence to satisfy any of the currently accepted standards as to the degree of corroboration necessary.

A. *The courts have adopted different interpretations of the rule as to the extent of the required corroboration.*

In a field where the verbal distinctions drawn by the courts are as numerous as the courts involved,

and perhaps more so since some circuits are not even entirely consistent within themselves, it is a happy circumstance that there appears to be no dissent from the proposition that the corroborative evidence need not be sufficient in itself to establish the case. It suffices if such evidence, together with the confession, prove the government's case. The language of Judge Learned Hand in *Daeche* v. *United States*, 250 Fed. 566 (C.A. 2) at 571, is:

> * * * We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither

> beyond a reasonable doubt nor by a preponderance of proof.

And in *Forte* v. *United States*, 94 F. 2d 236 (C.A. D.C.), it is stated at p. 240:

> * * * We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith.

And these views have been restated by both of these courts, and by others which have passed upon the issue. *Ercoli* v. *United States*, 131 F. 2d 354 (C.A. D.C.); *George* v. *United States*, 125 F. 2d 559 (C.A. D.C.); *United States* v. *Kertess*, 139 F. 2d 923 (C.A. 2), certiorari denied, 321 U.S. 795; *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2), certiorari denied *sub nom. Livolsi* v. *United States*, 343 U.S. 979; *Gregg* v. *United States*, 113 F. 2d 687 (C.A. 8); *Oldstein* v. *United States*, 99 F. 2d 305 (C.A. 10); *Jordan* v. *United States*, 60 F. 2d 4 (C.A. 4), certiorari denied, 287 U.S. 633.[21]

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[21] It follows, almost as a matter of course, that the evidence supporting the proof of the *corpus delicti* may be circumstantial and that there is no rule that there must be eye witnesses. *See St. Clair* v. *United States*, 154 U. S. 134, 152; *Perovich* v. *United States*, 205 U.S. 86, 91.

Where differences do crop up between the circuits is with respect to the extent of the subject matter which must be supported by the corroboration. While most courts agree that the corroboration must touch upon the *corpus delicti*,[22] there is a sharp divergence between the Second Circuit and the District of Columbia Circuit on whether all the essential elements of a crime must be touched upon, or whether it is sufficient for the outside evidence to support the proof of one of the essential elements. The *Forte* case in the District of Columbia stands for the former proposition and the position is stated even more clearly in *Ercoli* v. *United States*, 131 F. 2d 354 (C.A. D.C.) where the rule is restated at 356-357:

> Briefly stated the rule of the Forte case is that (1) there can be no conviction of an accused person in a criminal case upon an uncorroborated extra-judicial confession; (2) such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti; (3) however, such corroborating evidence need not, independent of the confession, establish the corpus delicti beyond a reasonable doubt; (4) if there is substantial evidence of the corpus delicti, independent of the confession, and the two, together, are convincing beyond a reasonable

[22] Even as to this, there is some disagreement. See cases collected in 7 Wigmore, *Evidence* (3rd ed.) § 2071.

doubt of a defendant's guilt, that is sufficient. And the rule was clearly restated in George v. United States.

The *Daeche* case in the Second Circuit stands for the latter rule and the differences between the two circuits are made even more explicit in *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2) at 576:

> * * * Whatever may be the rule elsewhere we have held that the extra-confessional proof required need not itself preponderantly establish the guilt of the defendant; if it shows by independent facts that the crime has been committed against which the jury can measure the reliability and consistency of a defendant's own statements, this is enough. The purpose of the rule requiring corroborative testimony is only to guard against convictions based upon an untrue confession. Warszower v. United States, supra, 312 U.S. at page 347, 61 S. Ct. 603. Its function is not so much to give evidence of the defendant's guilt as to supplement his confession to that effect.

B. *Under the less stringent interpretation, which we submit is the proper one, there is no real issue here on whether there was sufficient corroboration.*

When the interpretation adopted by the Second Circuit (in the *Daeche* case), in a situation involving a full confession, is applied to the admission of

a single damaging fact, certain technical difficulties appear, particularly if, as in *United States* v. *Calderon*, No. 25, this Term, the admitted fact is not part of the *corpus delicti*. However, *Daeche* appears to stand for the proposition that the corroboration need not deal directly with the fact admitted, but that it will be sufficient if it supports the accusation that a crime has been committed by providing evidence dealing with an essential element of the *corpus delicti*. In the present case the substantive offense charged includes two elements, first, the payment of money, and second, the performance of services. Petitioner's admissions deal only with the payment of the money. Under the *Daeche* interpretation, these admissions would be deemed sufficiently corroborated if outside evidence supports the proof of the other element of the offense, namely, that the services were rendered.

The Second Circuit's interpretation meets the underlying reason requiring corroboration which, as this Court stated in *Warszower* v. *United States*, 312 U.S. 342, at 347, is to protect "the administration of the criminal law against errors in convictions based upon untrue confessions alone." It is certainly desirable not to go beyond this by imposing any further restrictions on the admission of evidence, or on the functions of the jury in deciding contested issues of fact. The danger that no crime at all has been committed or that the accused's statements have been forced from him without any

basis in fact are protected against by the less stringent requirement of proving, not the entire crime, but an essential part thereof.

Under this interpretation of the rule, there is ample corroboration in this case. Actually, nearly the entire record, outside of the admissions, supports the assertions in the indictment that Hollifield exerted extraordinary efforts in order to obtain approval of petitioner's product for inclusion in the purchase order by the Air Force (see pp. 10-11, *supra*). Even if it is conceded that reasonable men could put different interpretations on the relationships between the petitioner and Hollifield and their various activities, not even petitioner now objects that there was insufficient evidence on this issue to go to the jury. The same evidence which was essential for the Government to make its case was sufficient to serve as corroboration for the admission, and if the sufficiency of that evidence is to be attacked, it should be done on the more basic proposition that the Government failed to prove it's case rather than upon the extension of a technical rule of evidence.

C. *Even under the more stringent interpretation there was sufficient corroboration in the record.*

On the basis of the *Forte* rule (*supra*, pp. 47, 48), not only would the corroboratory evidence have to support the performance of (or agreement to perform) services, but it would also have to touch

upon the payment of (or agreement to pay) the money. While such an interpretation seems to go far beyond the necessities of the rule, in the instant case there is actually ample evidence corroborating the admission of payment—as well as (as we have just shown) establishing the performance of the services.

As is pointed out above, the courts, without exception, agree that the corroborative evidence need not be sufficient by itself to establish the element of the crime covered by the admission. (*Supra*, pp. 45-47.) The District of Columbia Circuit says the evidence must be "substantial" (*Forte* v. *United States*, 94 F. 2d 236, at 240); the Second Circuit says it must "fortify" the admission (*Daeche* v. *United States*, 250 Fed. 566 at 571). What is substantial or what sufficiently fortifies is largely a matter of judgment delegated to the trial court, not unlike other questions of substantiality or sufficiency. But whichever test is used, the petitioner is taking liberties when he argues (Pet. Br. 26-27) that the substantiating evidence is not sufficient because it can be otherwise explained than on the theory of guilt. Cf. *Glasser* v. *United States*, 315 U. S. 60, 80; *Curley* v. *United States*, 160 F. 2d 229, 232-233 (C. A. D. C.), certiorari denied, 231 U.S. 837; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. In effect, if not in words, petitioner appears to be arguing for the rule that the *corpus delicti* must be established by an eye-witness, a proposition

which as Wigmore points out has never found acceptance in the United States. 7 Wigmore, *Evidence* (3d ed.) § 2081.

However, unless an eye-witness is required, there was ample evidence in the instant case corroborating the payment. As pointed out above (*supra*, pp. 12-15), the admission was petitioner's written statement that he gave Hollifield $1,000, amplified by his oral statements that the payment was made on April 14, 1951, in Chicago, from funds petitioner took from his home and replaced on April 16 by cashing a check. For purposes of convenience, the corroborative evidence may be classified under the headings of opportunity, means, and motive.

1. *The Opportunity.* Records of the telephone company prove that a long distance call was placed on April 13, 1951, from Hollifield's residence in Dayton, Ohio, to petitioner in Chicago (R. 415-416, RE 109, 111). Records from an airline show tickets were issued in Hollifield's name and were in fact used for a flight from Dayton to Chicago on the morning of April 14, 1951, and a return to Dayton that evening (R. 421-422, RE 112-113). This evidence certainly supports the statement in the admission that Hollifield pursuant to a telephone call came on to Chicago where the payment was made.

2. *The Means.* A Chicago bank teller identified a $1,000 check signed by petitioner, dated April 13, 1951 (the date of the telephone call), and made out to Cash (R. 426, RE 103). It was also testified that petitioner cashed that check on April 16, 1951 (R.

425-428). This certainly corroborates petitioner's statements as to the method of payment. Nor does it destroy the corroborative nature of this evidence to point out, as petitioner does (Pet. Br. 27), that he drew other checks in the same or larger figures. The bank statement indicating the clearing of these checks does not, moreover, give any indication that they were cashed by petitioner, or in fact, that they were drawn for cash (RE 104-106).

3. *The Motive.* The motive of course lies in the financial interest petitioner had in having his products accepted and the successful efforts of Hollifield to gain them acceptance in spite of the fact that they did not meet the original specifications.

And quite apart from the corroboration specifically discussed above, much of the other evidence introduced by the government indirectly supports the statement. Thus, the fact that in a prior transaction petitioner found it worth while to pay $4,000 to another business man who aided him in getting acceptance of another product by the Air Force indicated that, if he would pay in one case, he might well pay in another. The apparent attempt of the parties to conceal their relationship, and Hollifield's attempt to disassociate himself from the memorandum asking reconsideration of the glasses, support the theory that there was some sort of an agreement between the two. As Justice Sutherland stated in *United States* v. *Manton*, 107 F. 2d 834 at 848:

> * * * Certainly they are not the accompaniments of honest business. The circumstances

> of secrecy, intrigue and deviousness, and the attempts to conceal the real nature of the transactions, which the evidence discloses, are hallmarks of fraud and dishonesty, justifying the jury's conclusion that a criminal conspiracy existed * * *.

In the light of the entire body of the evidence, it is respectfully submitted that petitioner's statements concerning his payments to Hollifield were amply supported by other evidence. The admissions of the petitioner were extensively corroborated both by specific details such as the telephone call, the plane trip, and the check, and by persuasive general evidence of petitioner's previous method of dealing, of his financial motivation, of Hollifield's efforts in petitioner's interest, and of the pattern of concealment indicative of conscious guilt.

## III

**There Is No Basis for Reversal on the Ground That the Jury Relied on Confessions of the Petitioner's Co-defendant or That the Court Below Sustained the Conviction on That Evidence**

At this point, we pass from the issue of the appropriate use to be made of the petitioner's admissions and come to an entirely separate issue, whether the confessions of the co-defendant, Hollifield, were improperly considered either by the jury or by the court below either in convicting, or affirming the conviction of, the petitioner. For the pur-

poses of this issue it may be assumed that the petitioner's own admissions were properly considered as evidence against him.

Before turning to the question itself, it may be well to dispose first of an issue actually entirely absent from this case which the petitioner seeks to drag in by the heels. As we read the third point of petitioner's brief, it appears to be an attack upon the use of the conspiracy count in criminal indictments for the purpose of making available against co-conspirators evidence which would otherwise be inadmissible against them. Somewhat illogically, the petitioner grafts upon this straw man the suggestion that such abuse can be combatted by a generous application of the rule requiring corroboration of confessions. (Pet. Br. 30-34.) But the conspiracy argument has nothing to do with this case. None of the confessions of Hollifield were admitted against petitioner, nor could they have been since they were made long after the conspiracy was completed. In fact, the confessions were quite as relevant to the substantive counts against Hollifield as they were to the conspiracy count, so that the government neither sought nor gained any advantage in this respect by including a count for conspiracy.[23]

[23] The advantage is not always with the government in a conspiracy count, as against the substantive offense. In a famous case, after Fall and Doheny had been acquitted on a conspiracy charge, Fall was convicted and the conviction upheld, on a second indictment which charged a substantive offense under the statute here involved. *Fall* v. *United States*, 49 F. 2d 586 (C. A. D. C.), certiorari denied, 283 U. S. 867.

If petitioner had had a justified complaint with respect to confusion in the mind of the jury, it would have arisen from the perils inherent in the joint trial of defendants who had chosen to associate themselves in the criminal enterprise. While there is a danger co-defendants will be tarred with the same brush, the alternative of separate trials has definite elements of unfairness to individual defendants, depending on the order in which they are tried, as well as being onerous on the courts. Generally speaking, trials involving crimes of the nature of that here involved have been conducted against the defendants jointly and the convictions upheld. See e.g., *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C. A. 2), certiorari denied, 309 U. S. 664. The question of whether trials should be joint or several should be committed to the discretion of the trial court. Protection against prejudice is to be achieved by careful instructions by the trial judge rather than by importing artificial rules as the admissibility of evidence which, even assuming their merits for the situations for which they were designed, have no relationship to the abuse here to be protected against.

Turning now to the question of whether the jury improperly convicted the petitioner on the basis of Hollifield's confessions, reference is again made to the clear, repeated, and forceful admonitions of the trial judge as to the limitations on the use of that evidence (see *supra*, pp. 15-18). These in-

structions came not only at the conclusion of the trial, but also at the time the evidence was admitted (*supra*, pp. 15-17). Since petitioner levels not one word of criticism at these instructions, it must be assumed that they were, and are, satisfactory to him.

It being impossible to divine what has transpired in the minds of the jurors, the only method of determining whether they followed instructions is to consider their actions as against the evidence before them. The evidence is reviewed above, *supra*, pp. 5-15. It is submitted that, without any aid from the confessions of Hollifield, there was ample evidence to sustain the conviction of the petitioner.[24] This being so, there is no possible basis for reversal on this ground.

Turning from the verdict of the jury to the action of the court below in sustaining that verdict, we have not only its actions on the basis of the record, but also its stated reasons for acting as it did. It is noteworthy that the court's careful review of the evidence contains not a single fact which is not sustainable by evidence in the record outside of the confessions of Hollifield (R. 767-768).[25] On the

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[24] Petitioner argues that the jury's error in convicting petitioner on counts two and three, which the court below reversed for insufficient evidence, indicates they considered Hollifield's confessions against petitioner (Pet. Br. 31). This does not follow since, although there was some confusion, Hollifield's clearest statements, and both his written statements, denied payments beyond $1,200, which would like petitioner's own admissions, support only counts one, four, and five (R. 262, 284-5; RE 98-100).

[25] Petitioner points out that the court below did rely on matters which were not independently proved *dehors* the petitioner's own admissions (Pet. Br. 31). This is not only tru

contrary, it recognized in its opinion that these statements were not binding upon the petitioner (R. 769, 772). Moreover, in reversing the conviction on counts two and three, the court below specifically referred to the fact that some evidence supporting them could be found in Hollifield's statement but points out it could not be considered against petitioner (R. 772). Thus, both in actions and in words the court below appears to have refrained from considering incompetent evidence against the petitioner.

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In this Point, as indeed in Points I and II, petitioner appears to be attempting to shore up his case by attacking improper prosecution practices, assuming that this puts the government in the position of supporting such practices. When the issue is reduced by a consideration of the cold facts of the particular case, the "fruitful opportunity for prophylactic adjudication" (Pet. Br. 34) disappears and all that is left is an attempt to reverse a well-merited conviction on the basis of principles of law which have no application.

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but quite understandable in view of the court's holding that the admissions were properly before the jury. However, this is no basis for the argument that the court improperly considered Hollifield's confessions which it clearly recognized as not being binding on petitioner (R. 769).

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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